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SUBJECT: CANADIAN STAKEHOLDERS' CONCERNS ON COPYRIGHT AMENDMENT, SPECIAL 301 OCR, AND ENFORCEMENT

REF: A. OTTAWA 2833 (DEMARCHE ON SPECIAL 301

OUT-OF-CYCLE REVIEW)

[1B.](#) SECSTATE 173476 (DEMARCHE ON SPECIAL 301

OUT-OF-CYCLE REVIEW)

[1C.](#) OTTAWA 1168 (CANADIAN REACTION TO GOC'S PROPOSED COPYRIGHT LAW AMENDMENTS)

[11.](#) (SBU) Summary: We have met again with intellectual property (IP) rightsholders to discuss their views of GOC moves on IPR. Canadian industry frustration with ineffective IPR enforcement continues to grow, and further review of the proposed copyright amendment legislation (C-60) has revealed some complexities and emerging disagreement among stakeholders. The Canadian Motion Picture Distributors Association (CMPDA) also raised a new issue: camcording of new-release movies in theaters, which seems to be a significant problem in Canada. End Summary.

COMMENTS ON PROPOSED AMENDMENTS TO THE COPYRIGHT ACT

[12.](#) (SBU) In our meetings with IP rightsholders in Ottawa and Toronto, we found that most stakeholder concerns with C-60, the draft legislation to amend Canada's Copyright Act, were familiar (see Ottawa 1168). However, time has fine-tuned industry concerns and highlighted subtle differences in stakeholder positions.

[13.](#) (SBU) Internet Service Provider (ISP) Liability: For example, while the current USG action plan and U.S. stakeholders emphasize the need for a notice-and-takedown regime, Canadian industry opinions are mixed on the need to push for notice-and-takedown. The Canadian Motion Picture Distributors Association (CMPDA) is satisfied with the current notice-and-notice proposal in the draft legislation, hoping that the record-keeping requirements for ISPs will help their industry keep track of actions against online infringers. In CMPDA's view, the advent of peer-to-peer filesharing has lessened the need for notice-and-takedown, since fewer users are downloading their files from large websites of infringing material. On the other hand, the Canadian Recording Industry Association (CRIA), Canadian Alliance Against Software Theft (CAAST) and U.S.-based Business Software Alliance (BSA) representatives strongly believe that their industries still need a notice-and-takedown regime. This divergence seems to depend on how an industry's products are pirated and how recalcitrant they anticipate the GOC will be on the issue. Entertainment Software Association (ESA) representatives opined that the GOC "isn't going to budge" on the issue of notice-and-notice, possibly because of fears that a notice-and-takedown regime could be unconstitutional in Canada. C-60's general waiver of ISP liability was deemed overly broad by all stakeholders; they felt that the waiver of liability shouldn't be a blank check and that ISPs should be held responsible for the content of their users' websites once they become aware of the presence of copyright infringing files.

[14.](#) (SBU) Trafficking in circumvention "tools" (devices and software): Even in this area, which generally prompts a chorus seeking a ban against trafficking in tools to circumvent technological protection measures (TPM), industry associations were not entirely in agreement. CMPDA, CRIA, CAAST, and ESA are all firmly pushing for trafficking in TPM circumvention tools to be made illegal. Currently the draft legislation requires that the rightholder prove "intent to infringe" for trafficking in tools to be illegal, and as one industry representative points out, they already need to prove intent and therefore this legislative change doesn't give them any more ability to fight piracy. Industry representatives would also like a law that allows them to go after the larger-scale pirates selling circumvention tools, rather than continuing to have to go after the "little guys" who use them. However, the Information Technology Association of Canada (ITAC) represents security firms who occasionally circumvent TPMs, either to test their efficacy or to create fixes for various holes in the security. ITAC says that these niche activities need the protection of the "intent"

clause, although others argue that circumvention for reasons other than infringement could be specifically exempted in the legislation or could fall under 'fair use'. Prompted by its cyber-security members, ITAC therefore opposes any move to make trafficking in or creating TPM circumvention tools illegal and supports the current requirement to prove intent to infringe. (SBU comment: In an off-hand remark, an ITAC VP mentioned that ITAC may feel the need to "push the other side" to balance the anticipated lobbying from ESA, who will push strongly for trafficking in circumvention tools to be illegal regardless of intent. End comment.)

15. (SBU) Circumvention of TPMs intended to prevent access: In what the CMPDA characterizes as a possible oversight in the draft legislation, C-60 does not seem to make circumvention of TPMs intended to prevent access (as opposed to distribution) an offense. As with other issues of TPM circumvention, the major industry associations hope to fix this omission in the upcoming committee hearings on the draft legislation.

16. (SBU) No criminal sanctions for infringement: CRIA, ESA and CMPDA note that the WIPO treaties require "effective" deterrents to copyright infringement. C-60 as drafted does not provide any criminal provisions for circumvention, which CRIA and CMPDA believe will mean that Canada does not have adequate legal protection and effective remedies against copyright infringement. An ESA representative pointed out that the original Heritage Committee recommendations for legislation included a recommendation for criminal provisions for circumvention. (Comment: Per reflets, Heritage Canada's stronger stance on IPR protection has been generally undermined by Industry Canada's pressure for "balance." End comment.)

17. (SBU) Can C-60 be saved?: One of the most contentious insights that has arisen during recent consultations with IPR stakeholders is the question of whether stakeholders even want the bill to pass. Some industry representatives predicted that the bill will "die on paper" and criticized the potential for amending it in committee as likely to result in "a mess". These representatives expressed the expectation and hope that the legislation would be scrapped and described as a best-case-scenario the legislation dying after oral submissions (so that industries could make comments.) On the other hand, when asked if they wanted the bill to die, other industry representative seemed surprised and explained that their members would rather see this draft fixed, since if the bill dies, progress will be delayed for another year.

CUSTOMS ENFORCEMENT

18. (SBU) Numerous stakeholders noted that Justice Ministry, Canadian Border Services Agency (CBSA) and Royal Canadian Mounted Police (RCMP) top priorities--terrorism, the border, and counterfeits with safety issues like fake pharmaceuticals--do not currently leave much attention or funding for copyright protection. Anecdotal evidence of progress, including RCMP training and minor counterfeit seizures, was countered by general frustration over CBSA's lack of power and all three agencies' inaction. Since RCMP and Customs often do not respond to industry information on infringement, Embassy has requested greater industry feedback on industry's own enforcement actions. CMPDA gave an example of a private seizure of 11,000 counterfeit DVDs from one store in Toronto's Pacific Mall. (After giving the owner a list of counterfeit DVDs that the owner agreed to hand over, CMPDA officials were not surprised to return the next day to find the store completely restocked...with counterfeit DVDs.) ESA representatives also indicated that they intend to lobby for more RCMP resources to combat copyright infringement; they also hope to find a way for CBSA to have more power to seize shipments (although ESA and CMPDA mentioned that the border may become less important as Canadian-made counterfeiting increases). Obviously enforcement is an ongoing issue for IPR stakeholders, and we will provide further information as we receive it. (Comment: one contact told econoff of a recent discussion with a prominent IPR lawyer who suggested that industry associations not even try for criminal sanctions for TPM circumvention in C-60, since it would not be enforced and therefore would be just one more toothless law on the books. End comment.)

CAMCORDING IN THEATERS

19. CMPDA raised a new issue in meetings last week: camcording new-release movies in theaters to create counterfeit DVDs that often hit the streets within hours of the official movie premiers. Because movies open in Canada at the same time as in the United States, and because movies in Canada are shown in both French and English, Canada has become a primary source for camcorded counterfeits. In fact, according to CMPDA, of all theaters which are used for camcording new-release movies, 40 percent are in Canada, with the majority of that 40 percent coming from just two theaters

in Montreal. CMPDA has worked with the theater owners in question and is engaged in training their staff to combat this activity, but without any law against camcording in theaters, options are limited. RCMP and the local police can't do anything without proof of commercial intent, and generally the best CMPDA can hope for is that the offenders will be ejected from the theater for that particular showing.

CMPDA is developing an estimate of the economic loss from this sort of piracy, which they hope to use to prompt an amendment to the criminal code outlawing camcording in theaters. We have requested a copy of their loss estimates when compiled, and we will continue to follow this issue closely.

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